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IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1937.

No. 519

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, a corporation,

Petitioner,

vs.

JAMES D. COUGHRAN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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JAMES D. COUGHRAN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

State Farm Mutual Automobile Insurance Company, a corporation, petitioner, prays that a writ of certiorari issue to review the judgment entered July 26, 1937, in the United States Circuit Court of Appeals for the Ninth Circuit, in case No. 8330 entitled "State Farm Mutual Automobile Insurance Company, a corporation, Appellant, vs. James D. Coughran, Appellee."

Questions Presented.

[1.] When the trial court, sitting without a jury, has made a special finding of fact, may the Circuit Court of Appeals examine the bill of exceptions to determine whether or not, in the opinion of the Circuit Court of Appeals, the trial court was justified in making such finding of fact, and, upon reaching a contrary conclusion, disregard such finding?

[2.] When special findings of the trial court are contradictory and inconsistent, may the Circuit Court of Appeals go behind such findings and investigate the facts from the bill of exceptions and determine findings of fact of its own?

[3.] Where a contract of insurance is clear and unambiguous and separately states several "Risks Not Assumed by the Company", may the court ignore an exception separately stated and hold it to be qualified by another separately stated and independent exception?

Statement.

The basic facts upon which the questions arise are concisely stated in the majority opinion of the circuit Court of Appeals, which we adopt as follows:

> "Appellee having been injured in an automobile collision (automobile will be termed car herein) brought suit against R. O. Anthony and Helen B. Anthony charging negligence in driving of the car to Helen B. Anthony, wife of the registered owner. R. O. Anthony carried automobile insurance against such casualties in the appellant company. The appellant company, upon being advised of the accident, appeared under a non-waiver agreement. Judgment

was recovered by appellee against R. O. Anthony and Helen B. Anthony for $5,000.00, it not being paid execution was issued and returned unsatisfied. Suit was then prosecuted against the appellant insurance company and a trial by jury was waived, and the court after hearing the evidence and argument of the lawyers made and filed findings of fact and conclusions of law and entered judgment in favor of the appellee, to reverse which this appeal is prosecuted."

Two persons were in the insured automobile at the time of the accident, Helen B. Anthony, the wife of the assured, R. O. Anthony, an adult and licensed operator under the applicable California statutes, and Nancy Leidenacker, who was then 13 years of age and who was not and could not under the applicable laws have been licensed as an operator. For convenience we have italicized the pertinent provisions of the policy contract and of the findings of fact of the trial court hereinafter quoted.

The insurance policy involved was incorporated in the findings of the trial court. [Tr. of Record, opposite p. 16.] It provided that the company insured the policyholder in consideration of a stated premium and "subject to the terms and conditions of this policy" for a stated period of time which included the time of the automobile accident referred to. Under the heading "Terms and Conditions Forming a Part of This Policy" in bold face type, and the sub-heading also in bold face type, "Risks Not Assumed by This Company", the contract stated:

> *"The Company shall not be liable and no liability or obligation of any kind shall attach to the Company for losses or damage:* (A) To robes, wearing apparel or personal effects under Part I above; (B)

To any parts of the body, machinery and equipment of the automobile herein described while kept or stored separately or while not connected with said automobile; (C) Caused directly or indirectly by flood, invasion, insurrection, riot, civil war or commotion, military, naval or usurped power, or by order of any civil or military authority; (D) Unless the said automobile is being operated by the Assured, his paid driver, members of his immediate family, or persons acting under the direction of the Assured; (E) *Caused while the said automobile is being driven or operated by any person whatsoever either under the influence of liquor or drugs or violating any law or ordinance as to age or driving license;* (F) If the automobile described herein is used in carrying passengers for compensation (actual or implied) or as a taxicab, or is rented, or leased, or is operated in any race or speed contest, or is used for the transportation of high explosives of any nature, intoxicating liquors, or for the illegal transportation of any property; * * *"

The trial court made the following pertinent findings of fact:

"III.

"That on or about the 16th day of June, 1934, and while said policy was in full force and effect, one Helen B. Anthony *operated* the Chevrolet automobile referred to in and covered by said policy of insurance, with the permission and consent of the assured, R. O. Anthony, and operated the same negligently so as to proximately cause an accident and injury to the person and property of the plaintiff, to his damage * * *."

"XII.

"With regard to the second, separate defense of defendant, the court finds that *the said automobile at the time of the impact that resulted in the injury to the plaintiff was being jointly operated by Helen B. Anthony and Nancy Leidenacker* * * *; *that said Nancy Leidenacker was a minor* * * *; that the assured had forbidden said minor, Nancy Leidenacker, to drive any motor vehicle or automobile of which he was the owner or which he controlled; and that the action of said Nancy Leidenacker on the day of the accident and at the time of the impact involved in this action were in disobedience of and contrary to the commands, orders and instructions of the assured, R. O. Anthony; *that at the time of the accident, insofar as the propulsion of the vehicle was concerned, other than the means of direction, all instrumentalities of said automobile were being physically actuated by said minor, Nancy Leidenacker, with the acquiescence and knowledge of Helen B. Anthony* and without any knowledge, acquiescence or consent on the part of the assured, R. O. Anthony; that the proximate and direct cause of the collision between the insured automobile and a truck * * * was the act of Helen B. Anthony in seizing the steering wheel of the automobile at and immediately preceding the moment of impact and collision."

The court made other findings not here directly involved and concluded:

"From the foregoing facts the court concludes as a matter of law that the plaintiff is entitled to have and recover of the defendant herein judgment * * *."

The majority opinion of the Circuit Court of Appeals affirmed the judgment of the trial court. In so doing, the majority opinion recited that the findings of fact above quoted were "inconsistent", and proceeded to review the bill of exceptions (erroneously stated to be testimony) and disregarded the express finding of the trial court that the automobile was being jointly operated by the adult and the unlicensed minor. The majority opinion expressly recited that that finding of fact by the trial court "is not sustained" by the evidence.

In reaching its conclusion, the majority opinion held that Subdivision (E) of the "Risks Not Assumed by This Company" which reads:

> "The Company shall not be liable and no liability or obligation of any kind shall attach to the company for losses or damage: * * * (E) Caused while the said automobile is being driven or operated by any person whatsoever either under the influence of liquor or drugs or violating any law or ordinance as to age or driving license;"

is controlled by condition (D) which reads:

> "The Company shall not be liable and no liability or obligation of any kind shall attach to the Company for losses or damage: * * * (D) Unless the said automobile is being operated by the assured, his paid driver, members of his immediate family, or persons acting under the direction of the assured."

It is in consequence of said judgment and actions of the Circuit Court of Appeals that your petitioner seeks review by certiorari in this Honorable Court, to determine

the right of the Circuit Court of Appeals to disregard the findings of fact of the trial court, and upon its own examination of the bill of exceptions to set aside such findings as contrary to or not supported by evidence, and the further action of the Circuit Court of Appeals in its construction of the policy which we shall show is contrary to the plain and unambiguous language of the contract, and contrary to the plain, ordinary and popular understanding and construction thereof.

Reasons Relied Upon for the Allowance of the Writ.

It is respectfully submitted by your petitioner and relied upon as reasons for the granting of the writ that:

(A) The action of the Circuit Court of Appeals, in disregarding the express finding of the trial court that the car was being jointly operated and in examining the bill of exceptions and attempting to determine from it that the finding was not supported by evidence, was a departure from the accepted and usual course of judicial proceedings and of such importance as to cause this Court to exercise its power of supervision. The question is of such fundamental importance that it must affect every appealed case in all of the circuit courts. The action of the Circuit Court in the present case is contrary to an unbroken line of authorities descending from the earliest days of decision of this court, as exemplified in *Barnes et. al. v. Williams,* 11 Wheat. 415; 6 Law Ed. 508, to *United States v. Esnault-Pelterie,* 81 Law Ed. Adv. Op. 98;

(B) The action of the Circuit Court of Appeals in holding that the separately stated specifications of

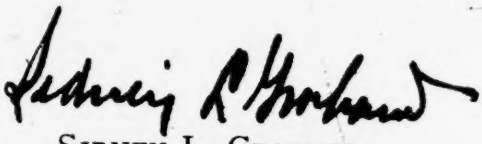
"Risks Not Assumed by This Company" specifying that the Company shall not be liable unless the automobile is being operated by the assured, the paid driver, members of his immediate family or persons acting under the direction of the assured "controlled" the specification that the company shall not be liable for losses or damage caused while the automobile is being driven or operated by any person whatsoever violating any law or ordinance as to age or driving license, is untenable as a matter of law and in conflict with the weight of authority;

(C) That the case involves a question of the weight and consideration to be given by the Circuit Court of Appeals to findings of facts of the trial court and a question of construction of contract, and of an insurance contract, in which there is a peculiar public interest, and presents fundamental questions of law upon which there should be no diversity of opinion in the several circuit courts of appeal. That such diversity exists unless this Court shall exercise its power of supervision and hear and determine the present case.

Wherefor, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals, for the Ninth Circuit, directing that court to certify and send to this court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket "No. 8330, State Farm Mutual Automobile Insurance Company, a corporation, Appellant, v. James D. Cough-

ran, Appellee", and that the judgment of said court therein be reversed by this Honorable Court, and that your Petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

October, 1937.



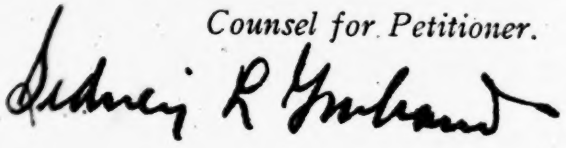
SIDNEY L. GRAHAM,
Counsel for Petitioner.

JOSEPH A. SPRAY and
F. BRITTON MCCONNELL,
Of Counsel for Petitioner.

Certificate of Counsel.

I hereby certify that the foregoing petition is well founded and not interposed for delay.

SIDNEY L. GRAHAM,
Counsel for Petitioner.



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No. .....

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, a corporation,

Petitioner,

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JAMES D. COUGHRAN,

Respondent.

Brief in Support of Petition.

Opinion Below.

No opinion was written by the court of first instance. The opinion in the United States Circuit Court of Appeals for the Ninth Circuit was filed July 26, 1937, and is not yet reported in the Federal Reporter.

Jurisdiction.

The judgment of the Circuit Court of Appeals was filed July 26, 1937. No petition for rehearing in that court was filed. This petition for writ of certiorari is filed within three months after the filing of the judgment of the Circuit Court of Appeals.

The jurisdiction of this court is invoked under section 240 of the Judicial Code, 28 U. S. C. A. 347.

Statement of the Case.

The essential facts of the case are stated in the accompanying petition for certiorari, and in the interest of brevity are not here repeated. Any necessary elaboration will be made in the course of the argument which follows.

Specification of Errors.

The Circuit Court of Appeals erred in each of the following particulars:

(1) In failing to give effect to the special findings of fact of the trial court;

(2) In disregarding the special findings of fact of the trial court and proceeding to an examination of the bill of exceptions and a determination therefrom as to the facts which it conceived ought to have been found by the trial court;

(3) In holding that the findings of the lower court were "inconsistent";

(4) In failing to reverse the judgment and remand for a trial *de novo* if the findings were "inconsistent";

(5) In placing upon the insurance contract a novel and strange construction which is contrary to the plain, unambiguous, common and popular meaning of the language of the contract.

Argument and Authorities in Support of Petition.

In California, as in most other states of the Union, there are state statutes prescribing and regulating the minimum age of operators of automobiles. It is needless to point out by citation of authority that such regulations are based upon a sound public policy, and are designed for the protection of the public. It is but natural and proper that an insurance policy upon automobiles should conform to this public policy and recognize the peculiar and uninsurable hazards which arise from the violation of such statutes. The right of an insurer to exclude from coverage a vehicle being operated by a minor in violation of law as to age or drivers license is expressly recognized by this Court in *United States Fidelity and Guaranty Co. v. Guenther,* 281 U. S. 34-38, 74 Law Ed. 683.

We quote at this point the applicable statutes of the State of California.

The Motor Vehicle Act of California (Stats. 1931, 2108, par. 64 (a), chapter 1026, provides:

> "An operator's license shall not be issued to any person under the age of 16 years, * * *" (Except under circumstances not involved here.)

The Motor Vehicle Act of California (Stats. 1927, page 1427, par. 58 (a), also in effect at the time of the accident herein involved) provides:

> "It shall be unlawful for any person to drive a motor vehicle upon any public highway in this state, whether as an operator or a chauffeur, unless such person has been licensed as an operator or a chauffeur; * * *."

The Motor Vehicle Act of California (Stats. 1923, page 536, par. 76, also in effect at that time) provides:

> "No person shall authorize or knowingly permit a motor vehicle owned by him or under his control, to be driven by any person who has no legal right to do so or in violation of the provisions of this act."

Sections 1 and 18 of the California Motor Vehicle Act (Stats. 1923, p. 518) define an "operator" to be

> "Every person who drives, operates or is in actual physical control of a motor vehicle upon a public highway."

The trial court found and it was a fact which was never disputed, that at the time of the accident Nancy Leidenacker was a child of the age of 13 years who was not and could not under the laws of California have been licensed to drive or operate an automobile upon the public highways. It was found and never disputed that the accident occurred upon a public highway. Nancy Leidenacker was a pupil at a private school operated by Mrs. Helen B. Anthony and her husband, R. O. Anthony, and at the time of the accident Mrs. Anthony was transporting the girl from the school in an adjoining county to her home in the city of Los Angeles.

The provisions of the insurance contract put in issue the question as to whether the accident was "caused *while* the said automobile is being driven or operated by any person *whatsoever* either under the influence of liquor or drugs or *violating any law* or ordinance as to age or driving license."

In response to this issue the trial court made a direct, certain and unambiguous finding of fact in the following language:

"That said Nancy Leidenacker was a minor and not permitted under the applicable laws to operate a motor vehicle in the state of California; * * * that *at the time of the accident,* insofar as the propulsion of the vehicle was concerned, other than the means of direction, all instrumentalities of said automobile were being physically actuated by said minor Nancy Leidenacker, with the acquiescence and knowledge of Helen B. Anthony * * *" [Findings of Fact No. XII on p. 22 of the Tr. of Record],

and the trial court further found:

"That the court finds from the evidence that the Chevrolet automobile was being *jointly operated* at the moment of accident—at the time of impact that resulted in the injury to the plaintiff in this case by Helen B. Anthony and the girl, at that time who was a minor and not permitted under the applicable laws to operate a motor vehicle in the state of California; that as far as the propulsion *or driving of the vehicle was concerned,* other than the means of direction, all instrumentalities were being physically actuated by the minor; (and that said acts were done) with the acquiescence and knowledge of Helen B. Anthony * * *." [Tr. of Record, p. 61.]

Now, especially inviting the attention of the Court to the provisions of the statutes, we submit the following as a concise and logical statement of the matters of fact and principles of law involved (quoting from the dissenting opinion filed in the United States Circuit Court of Appeals by Mr. Justice Wilbur):

"In view of the statutory definitions of what constitutes an operator, namely, one in actual physical

control of a motor vehicle (Cal. Motor Vehicle Act 1, 18, *supra*), and in view of the purpose of the law to protect the public from the lack of judgment and skill of a young child, it seems clear that the child was driving the automobile in the case at bar within the meaning of that term as defined in the statutes of California and, consequently, was violating the law of California, and that the wife also who, in a legal sense had control of the car, was violating the statute by permitting the child to operate the car. Therefore, whether we consider the question from the standpoint of the action of the child or of the wife the car was operated in violation of law as to age and driving license. If it was operated in violation of such a law the policy expressly provides that there shall be no liability on the part of the Insurance Company. If we assume, as the court found, that the car was being jointly operated and that the child had control of some part of the driving mechanism, and the wife had control of another portion, it is still true that each was violating the provisions of the law—the child by driving the car and the wife by permitting her to do so."

The force of this reasoning was sought to be avoided in the majority opinion in the Circuit Court of Appeals in a manner which we shall now discuss. The majority opinion made reference to Finding No. III which recited that

> "Helen B. Anthony operated the Chevrolet automobile referred to in and covered by said policy of insurance, with the permission and consent of the assured, R. O. Anthony, and operated the same negligently so as to proximately cause an accident and injury to the person and property of plaintiff, to his damage * * *."

Comparing this finding with the findings of fact last hereinabove quoted (see Finding XII, *supra*), the majority opinion stated:

> "This finding that the car was jointly operated by Helen B. Anthony and the passenger minor is *inconsistent* with Finding III that Helen B. Anthony operated the car. And to elucidate the truth a review of the testimony is required."

Recalling the provisions of condition (D) of the policy, above quoted, the majority opinion supplemented its comment upon Finding No. III to the effect that Helen B. Anthony operated the insured automobile at the time of the accident, by noting the recitation in Finding XII [Tr. of Record, p. 22] that

> "said Helen B. Anthony was a member of the assured's immediate family * * *"

This finding satisfied the conditions of condition (D) of the policy which required in the first place that the automobile be operated by a member of the immediate family of the assured at the time of the accident in order that the benefits of the insurance protection might be claimed. But this had no relation to the requirements of condition (E) of the policy. This is so because if the fact had been that Mrs. Anthony was in the rear seat of the automobile while it was being driven by the minor, Nancy Leidenacker, Mrs. Anthony would have been operating the automobile in legal contemplation. The distinction has often been noted in the reported cases and while it may not require elaboration we submit the following authority as concisely and correctly disposing of the subject.

In *Bosse v. Marye,* 80 Cal. App. 109, 250 Pac. 693 (Dec. 1, 1936), the facts were that at the time of the accident in question the defendant's automobile was being driven by Helen Marye, an unlicensed minor, with the permission of Claudine Spreckles who sat with her on the front seat. The Spreckles girl was a licensed automobile operator, and, being a minor, the license was issued upon the application of her father who was also a defendant, the state statute imputing any negligence of the minor to the parent upon whose application the license was issued. The defendant father's contention was that he could not be held liable because the automobile was neither driven nor operated by his daughter at the time of the accident. In response to this contention the opinion states:

> "The liability of a parent under the statute mentioned is not limited, however, to negligent acts of the minor resulting from 'driving' an automobile, the statute employing the broader term 'operating or driving', showing a clear intention to include within such liability any negligent act which is the direct result of the privilege extended by the state to said minor, under his or her operator's license to operate an automobile upon a public highway. 'To drive' is defined as meaning, 'to impel the motion and quicken'; whereas, 'to operate' means 'to direct or superintend'. (Century Dictionary). * * * We therefore conclude that, *although not driving the automobile* at the time of the accident, Miss Spreckles was nevertheless in control of its movements, and *was operating the same* over the highway under the authority of her license; and that being so, that she was primarily responsible jointly with Miss Marye for its negligent operation."

Looking now to the findings of fact as to the actions of the two occupants of the insured car, Helen B. Anthony and Nancy Leidenacker, we have, as to the former (Finding No. III), that "Helen B. Anthony operated" the car and the further finding of fact (Finding No. XII) of her "seizing the steering wheel of the automobile at and immediately preceding the moment of impact and collision;" as to the latter, Nancy Leidenacker, that the car was (Finding No. XII) "being jointly operated by Helen B. Anthony and Nancy Leidenacker" and the further finding "that at the time of the accident, insofar as the propulsion of the vehicle was concerned, other than the means of direction, all instrumentalities of said automobile were being physically actuated by said minor, Nancy Leidenacker, with acquiescence and knowledge of Helen B. Anthony * * *."

Consequently there was no conflict between nor inconsistency arising upon the facts found by the trial court. The error of the majority opinion is found in the following language quoted from it:

> "This finding that the car was jointly operated by Helen B. Anthony and the passenger minor is inconsistent with Finding III that Helen B. Anthony operated the car. * * * The conclusion in Finding XII that the passenger minor was a joint driver is not sustained, and has no weight as against Finding III, a finding of positive ultimate fact that Helen B. Anthony was the driver of the car."

This Court will have observed that there actually was no finding by the trial court that "Helen B. Anthony was the *driver* of the car." The finding was that she "oper-

ated" and "jointly operated" with the unlicensed minor. The trial court made no nice distinction between "operating" and "driving". None was required as the policy provision expressly stated as a risk not assumed by the company any loss or damage caused while the automobile was being "driven or operated by any person whatsoever * * * violating any law or ordinance as to age or driving license." The act of Helen B. Anthony thus found by the trial court was in violation of paragraph 76 of the Motor Vehicle Act of California, *supra,* and the act of Nancy Leidenacker was in violation of paragraph 58 and 64 of the same statute above quoted.

While we respectfully submit that there is no inconsistency in the finding of fact of the trial court, this contention in no way qualifies our position that the Circuit Court of Appeals erred in disregarding a finding, or in attempting to reconcile "inconsistent" findings and that the construction placed upon the contract by the majority opinion was untenable and contrary to the weight of authority, which contentions are hereinafter set forth.

There Can Be No Review by the Circuit Court of Appeals of the Findings of Fact Made by the Trial Court. The Facts Are Conclusively Settled by the Findings of the Trial Court.

The principle stated in the caption has been the settled law of the federal appellate courts at least since the decision of this court in *Barnes, et al. v. Williams,* 11 Wheat. 415; 6 Law Ed. 508. The principle has been recognized and followed in innumerable cases in the lower courts. It has often been declared by this Court.

The principle is expressly declared in 28 U. S. C. A., Sec. 773.

In *Town of Walnut v. Wade,* 103 U. S. 683; 26 Law Ed. 526, this Court said:

> "One thing is clear: that there can be no review in this court of the finding of fact made in the court below * * * In *Norris v. Jackson,* 9 Wall. 125, 76 U. S. 608, this Court said: 'A special finding is not a mere report of the evidence, but a statement of the ultimate facts on which the law of the case must determine the rights of the parties; a finding of the propositions of fact which the evidence establishes and not the evidence on which those ultimate facts are supposed to rest. Whether the finding be general or special, it should have the same effect as the verdict of a jury; that is to say, it is conclusive as to the facts so found. In the case of a special verdict (finding) the question is presented as it would be if tried by a jury, whether the facts thus found require a judgment for plaintiff or defendant. The bill of exceptions, while professing to detail all the evidence, is no special finding of the facts."

To the same effect see *Stanley v. Board of Supervisors,* 121 U. S. 443, 30 Law Ed. 1000.

See, also:

Hammer v. The Garfield Mining & Milling Co., 130 U. S. 279, 32 Law Ed. 964;

United States v. Esnault-Pelterie, 81 Law Ed. Adv. Op. 98;

Wear v. Imperial Window Glass Co., 224 Fed. 60.

In *Insurance Co. of. North America v. International Trust Co.*, 71 Fed. 88, the rule was concisely stated by the court as follows:

> "The rule is inflexible in the federal courts that when a jury is waived, and the court makes a special finding, an appellate court cannot look into the evidence on which the finding is based, except for the purpose of ascertaining whether an error was committed in admitting or excluding testimony." (Citing cases.)

The conclusion reached in the majority opinion depended upon the recitation in the opinion that:

> "The conclusion in Finding XII that the passenger was a joint driver *is not sustained* * * *."

The procedure of the Circuit Court of Appeals was clearly in violation of the authorities above cited. Passing beyond this point, however, we must notice the further statement in the majority opinion:

> "And to elucidate the truth, a review of the testimony is required."

As the transcript of record shows, the transcript of the testimony was not brought up to the Circuit Court of Appeals. All that was before it was the bill of exceptions and, likewise, its examination of the bill of exceptions in an attempt to impeach the findings of fact of the trial court was in violation of the authorities.

Even if it were conceded, as stated in the majority opinion, that the findings of fact concerning the identity

of the operator or driver of the automobile were "inconsistent" it was not within the province of the Circuit Court of Appeals to examine the bill of exceptions and adopt findings of fact of its own, but it was the duty of that court to reverse the judgment and remand it to the trial court for a new trial.

In *Graham v. Bayne,* 18 How. 60, 15 Law Ed. 265, this Court said:

> "If a special verdict be ambiguous, or imperfect—if it find that the evidence of facts, and not the facts themselves, or finds but part of the facts in issue, and is silent as to others, it is a mistrial, and the court of error must order a *venire de novo.* They can render no judgment on an imperfect verdict, or case stated."

We conclude consistently with subdivision A of the Reasons Relied Upon for the Allowance of the Writ that the action of the Circuit Court of Appeals in disregarding the express finding of the trial court that the car was being jointly operated and examining the Bill of Exceptions and attempting to determine from it that the finding was not supported by evidence was a departure from the accepted and usual course of judicial proceedings and of such importance as to cause this Court to exercise its power of supervision.

The Policy Contract Was Clear and Unambiguous and Not Susceptible to the Construction Placed Upon It by the Circuit Court of Appeals. The Policy Expressly Excluded the Loss in Question.

We have heretofore quoted verbatim the provisions of the policy involved. The policy is set out verbatim opposite page 16 of the transcript of record. Like all such contracts, it specifies certain risks which are excluded from coverage. It is apparent that there must be many risks which arise in connection with the subject matter of every insurance which are, by their nature, uninsurable. Others involve such a substantial increase of hazard that the underwriter properly excludes them leaving the insurance of such hazards to special contract and agreement for the required additional premium. The present policy was standard in form although not prescribed by any applicable statute. It provides that the insurance is "subject to the terms and conditions of this policy". In a separate subdivision of the policy under a caption in large bold face type it recites "Terms and Conditions Forming a Part of this Policy". This is followed by a further specification in bold face type at the beginning of the succeeding paragraph with the words "Risks Not Assumed by this Company". This is followed by an introductory and governing proviso applicable equally to each of the following subdivisions as follows:

> "The Company shall not be liable and no liability or obligation of any kind shall attach to the Company for losses of damage: * * *."

The colon is then followed by subdivision (A) which relates to personal property excluded from the theft provisions of the policy; (B) to parts not connected with the

automobile; (C) to floods, riots, war, etc., (D) and (E), the subdivisions heretofore quoted verbatim, (F) the carrying of passengers for hire, (G) relating to the interest of the assured in the automobile, (H) to assignments, (I) to the exclusion of workmen's compensation liability, (J) to concurrent insurance, (K) to assumption of liability by agreement as contrasted to liability imposed by law and (L) to subrogation rights. In examining the contract the Court will observe that its manner of subdivision and punctuation is the usual form found in statutes, rules of court and commercial contracts of every kind and description.

The suggestion that these separately stated subdivisions are interdependent and "controlled" one by the other is a novel feature of the majority opinion of the Circuit Court of Appeals and the basis of the error of that court in construing the contract.

We have no quarrel with the authorities holding that where an insurance contract is ambiguous and susceptible to reasonable interpretation, the court will adopt the interpretation most favorable to the insured. We submit, however, that the present contract is not tainted with ambiguity and that this rule has no application in the present case. The statement in the majority opinion is:

> "Both the *insurance* clause and the *exemption* clauses must be strictly construed against the insurer. In thus interpreting these exemptions it appears clear exemption (E) is controlled by (D) as to operator of this car * * *."

The majority opinion therefore apparently contends that insurance contracts are subject to a different rule of construction than contracts of another character. This Court has often pointed out the fallacy of such reasoning.

In the *Imperial Fire Insurance Co. of London, England, v. County of Coos,* 151 U. S. 452, 38 Law Ed. 231, the opinion states:

> "But the rule is equally well settled that contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous, their terms are to be taken and understood in their plain, ordinary, and popular sense."

The same opinion discusses at some length the nature of contracts of insurance and recognizes the necessity that the insurer define and limit the scope of the indemnity. It is pointed out that "the courts may not make a contract for the parties." This case involved practically the same phraseology as that employed in the contract in the present case. The specification of risks not assumed by the insurer began with a general recitation introducing that subject matter followed by subdivisions separately specifying the several exemptions. The opinion stated:

> "These terms and conditions of the policy present no ambiguity whatsoever. The several conditions are separate and distinct, and wholly independent of each other."

We earnestly invite the attention of the court to the similarity of the contract construed in that case to the contract involved in the present case, and also direct the court's attention to *United States Fidelity and Guaranty Co. v. Guenther,* 281 U. S. 34-38, 74 Law Ed. 683.

A like and exact analogy is found in the recent case of *Travelers Protective Association v. Prinsen,* 291 U. S. 576; 78 Law Ed. 999. The text of the policy provision which corresponds to the policy provision referred to in

the policy in the present case is set forth in the footnote at page 1000 of 78 Law Ed. In that case as in the present case the specifications of the exceptions began with a general introductory statement which was a part of each and every several specification in the remainder of the paragraph. Each of these several specifications was separated by a semi-colon in exactly the same manner as in the present policy.

The erroneous reasoning of the majority opinion may be further analyzed in the light of this instructive opinion. The majority opinion in the present case recited that "the licensed operator of the car was in control and did personally direct the car movement and did physically change the course of the car and ran it into the truck. This was the sole and proximate cause of the accident and without which the accident would not have occurred." Under the explicit language of the present policy the question of proximate cause played no part in determination of the scope of the indemnity. The risk which was stated to be one not assumed by the company was not a risk or loss caused *by* operation of the vehicle by an unlicensed minor but was in the following distinctive language:

> "The company shall not be liable and no liability or obligation of any kind shall attach to the Company for losses or damage caused: * * * Caused *while* the said automobile is being driven or operated by any person whatsoever either under the influence of liquor or drugs or violating any law or ordinance as to age or driving license."

By this form of policy the insurer avoided mystifying subtleties as to causal relation. The plain fact found by the trial court was that at the time of the accident the automobile was being driven or operated in violation of

law as to age or driving license; the loss or damage was caused *while* it was being so driven or operated and it was this risk which was expressly excluded from the insurance.

See also:

Shepherd v. Mutual Life Ins. Co., 63 Fed. (2d) 578;

Maryland Casualty Co. v. Freidman, 45 Fed. (2d) 369;

Order of United Com. Travelers v. Edwards, 51 Fed. (2d) 187.

We therefore submit that the construction placed upon the contract of insurance by the Circuit Court of Appeals is contrary to the plain and unambiguous language of the contract and inconsistent with the plain, ordinary and accepted meaning of the phraseology employed in the contract. Affirmance of the decision would cast doubt upon the meaning of innumerable statutes and contracts and would amount to the overruling of previous decisions of this Court.

In conclusion it is respectfully submitted that this Court should issue its Writ of Certiorari to the United States Circuit Court of Appeals in this action

October, 1937.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 519

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Petitioner,

vs.

JAMES D. COUGHRAN.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

PETITIONER'S SUPPLEMENTAL BRIEF AND AUTHORITIES.

JOSEPH A. SPRAY,
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